80-846

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. 2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct and an improper jury instruction where these issues were waived by the respondent's failure to demonstrate cause and prejudice for his procedural defaults.

3. Whether this case should be remanded to the district court which granted habeas corpus relief without considering the entire State trial transcript and where the petitioner requested such relief before the court of appeals.

4. Whether the respondent's right of confrontation was abridged when the state trial court limited his cross-examination of the rape victim concerning her prior statements to his defense counsel but where the respondent's offer of proof at his state trial demonstrated that a proper foundation could not be laid for admission of the prior statements.[1]

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[1] Former Warden Vinson Thompson and the Attorney General of Tennessee were originally named as respondents in the District Court. In April 12, 1979, Jim Rose was substituted for Vinson Thompson pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Tennessee, on behalf of Jim Rose, Warden of the Tennessee State Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on June 27, 1980, and is attached hereto as Appendix A. The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit denying a petition for a rehearing and sug-

gestion en banc on September 4, 1980, is attached hereto as Appendix B.

The unreported memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division and order granting Lundy's petition for writ of habeas corpus on March 21, 1979, is attached hereto as Appendix C. The opinion of the Tennessee Court of Criminal Appeals affirming Lundy's state convictions on August 30, 1974, is reported at 521 S.W.2d 591 (Tenn. Crim. App. 1974), and is attached hereto as Appendix D. The order of the Tennessee Supreme Court denying Lundy's petition for writ of certiorari on March 10, 1975, is attached hereto as Appendix E.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on June 27, 1980. The State's petition to rehear and suggestion en banc was denied by order of that Court on September 4, 1980. This petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state ... shall ... deprive any person of life, liberty, or property, without due process of law ...

3. 28 U.S.C. 2254 provides in pertinent part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

4. The provisions of Tennessee Code Annotated, section 40-3802 provide in pertinent part:

A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies....

5. The provisions of Tennessee Code Annotated, section 40-3805 provide in pertinent part:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way or any right guaranteed by the constitution of this state or the constitution of the United States...

STATEMENT OF THE CASE[2]

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of one hundred and twenty (120) years and fifteen (15) years, respec-

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[2] References contained within this statement are to pages of the Appendix filed in the United States Court of Appeals for the Sixth Circuit. The Appendix contains portions of the state trial transcript, but the entire state trial transcript was not before the federal courts below.

tively, in the Tennessee State Penitentiary. (A. 107).[3] Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974, and the Tennessee Supreme Court denied review on March 10, 1975. (A. 106-115, 131). Noah Lundy then petitioned the Knox County Criminal Court, Tennessee, for a writ of habeas corpus which was denied, after an evidentiary hearing, on May 3, 1976. (A. 154).

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. 2254 and alleged four grounds for relief:

> (1) that he was denied his right of confrontation during cross-examination of the prosecutrix;
>
> (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character;
>
> (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing arguments, that the only proof before the jury was from the state's witnesses and was uncontradicted and rebutted; and,
>
> (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (A. 155-164).

The district court granted habeas corpus relief to Noah Lundy on March 21, 1979 which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (A. 177-184).

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[3] A narrative of the facts of the crimes is set forth in the opinion of the Tennessee Court of Criminal Appeals attached herewith, as Appendix D, p. A-14).

At Lundy's trial the rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

Q. So you had had intercourse with boys during 1973, is that true or not true?

A. Just Aaron Miller.

Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A. Not in the year '73. That was the year before in '72.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A. I don't remember how many times.

Q. *That's what you told me previously*

A. *I don't remember.*

* * *

Q. Miss Murphy, *did you or did you not tell me on an occasion when I talked with you that you had had intercourse, with Aaron Miller ten to twenty times?*

A. *I don't remember.* (A. 3-4) [emphasis added].

An objection was made to this line of examination by the prosecuting attorney which was sustained by the trial court, following a jury-out hearing, upon the erroneous ground that the prior statements allegedly made by the witness to the defense counsel were made prior to the defense counsel's identification of himself to the witness as representing the defendant in the case. (A. 13). On direct appeal, the Tennessee Court of Criminal Appeals held that such reasoning was erroneous but harmless in light of the offer of proof subsequently made at a jury-out hearing where the counsel did have an opportunity to question the rape victim concerning her prior statements to the defense counsel. The offer of proof was as follows:

A. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times. . . .

A. *I don't remember if I said exactly that.*

Q. Did you tell me you had had intercourse with one Danny Nipper four times?

A. I remember telling you I had had intercourse with him, *but I don't remember how many times I had told you.* (A. 33) [emphasis added].

The district court held that this amounted to a denial of confrontation in violation of the Sixth Amendment.

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

Q. How long did he [defendant] date your sister?

MR. WORKMAN [defense counsel]: Well, your Honor, I really don't understand the materiality of all this.

GENERAL EVANS [prosecuting attorney]: Well, if you just give him time, I'm sure he'll figure it out.

THE COURT: Well . . ..

GENERAL EVANS: Your Honor, if he wants me to explain it to him in front of the jury, I'll be glad to.

MR. WORKMAN: Your Honor, I don't know where he's trying to lead, but maybe we ought to let the jury step out and find out. I honestly do not know what he's trying to get to.

THE COURT: Very well, gentlemen. I sustain the objection on the basis that it is leading. You may take your time and develop your case, General

Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

MR. WORKMAN: Your Honor, I still don't see the materiality of this as to . . .

GENERAL GILL: *I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.*

MR. WORKMAN: Your Honor . . .

GENERAL GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's materiality.

MR. WORKMAN: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.

GENERAL EVANS: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was. (A. 19-20) [emphasis added].

After the foregoing colloquy, the trial court ordered the jury to be excused from the courtroom during the jury-out proceedings to determine the admissibility of such line of examination. (A. 21).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which are the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. *The only story we've heard about* what happened from about 8:15 of the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* And we're suppose [sic] to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at one point she had her hands somewhere on his back. (A. 38-39) [emphasis added].

The district court held that the two foregoing statements deprived Lundy of a fair trial in violation of the Fourth Amendment.

The trial judge instructed the jury as follows which instruction is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for *every witness is presumed to swear the truth.* (A. 44) [emphasis added].

The district court found that grounds 1 and 2 of Lundy's petition had been fairly presented to the Tennessee Supreme Court but that Lundy had not exhausted his available state remedies with respect to grounds 3 and 4 of his petition. (*See* Appendix C, attached herewith, p. A-6). The district court granted habeas corpus relief to Lundy on March 21, 1979 and ordered the State of Tennessee to re-try Lundy within ninety (90) days or to

release him from custody. (*See* Appendix C, attached herewith, p. A-5). The state appealed to the United States Court of Appeals for the Sixth Circuit which Court affirmed the judgment of the district court on June 27, 1980. The petitioner's petition for rehearing and suggestion en banc was denied on September 4, 1980. This petition has been timely filed within ninety (90) days of the judgment of the United States Court of Appeals for the Sixth Circuit. *See* 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE PETITION

1. This case presents the important question of whether or not district courts should entertain petitions for relief under 28 U.S.C. 2254 which contain "mixed" claims for relief, *i.e.*, exhausted and unexhausted claims for relief. Lundy's petition for habeas corpus relief contained four claims for relief; two of which have been presented to the Tennessee Supreme Court and on two of which Lundy has not exhausted his available state remedies. This question has been resolved differently by three circuit courts of appeals. This question was reserved in a case decided on other grounds by this Court.

The State of Tennessee contends that before considering an unexhausted claim a federal court must engage in a balancing process to determine whether the principles of comity outweigh the necessity for immediate federal resolution of the claim. The district court's non-compliance with the exhaustion requirements of 28 U.S.C. 2254(b) seriously jeopardizes the principles of federal-state comity. The entire petition should be dismissed, particularly where the claims are interrelated, so as to prevent inconsistent results with the state court's subsequent review of the unexhausted claims. In this case, the district court found that the "mixed" claims were interrelated but nonetheless refused to dismiss the petition.[4]

The Fifth and Ninth Circuit Courts of Appeals have held that petitions for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition contains "mixed" claims for relief. *See Galtieri* v. *Wainwright*, 582 F.2d 348, *en banc* (5th Cir. 1978); *Gonzales* v. *Stone*, 546 F.2d 807 (9th Cir. 1976). A conflict now exists between the circuits as the United States Court of Appeals for the Sixth Circuit specifically rejected the decisions of the Fifth and Ninth Circuits.[5]

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[4] *See* Appendix C. pp. A-12-13, attached herewith.

[5] *See* Appendix A, p. A-1, attached herewith.

While only three circuits have addressed the issue of whether or not a "mixed" petition should always be dismissed, several circuits have held that a district court may *not* consider petitions containing *interrelated* "mixed" claims.[6]

Additionally, this issue has been presented to this Court in *Francisco* v. *Gathright*, 419 U.S. 59, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974) but was reserved for future resolution as the case was decided on other grounds. *Id.* 419 U.S. at 63-64, 95 S.Ct. at 259-260, 42 L.Ed.2d at 230.

The State contends that the comity principles which underlie the exhaustion doctrine are more fully realized when a federal court is required to dismiss, without prejudice, all petitions for habeas corpus relief which contain exhausted and unexhausted claims for relief. Such a rule would eliminate piecemeal litigation in accordance with the judicial policy against fragmentary appeals, and it would also relieve federal courts from a burden of successive petitions. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 274, 93 S.Ct. 2041, 2071, 36 L.Ed.2d 854, 890 (1972) (Powell, J., concurring).

Such a rule would also promote the finality of criminal convictions by requiring the state prisoner to resolve all his claims of the entire case in a single proceeding rather than engage in piecemeal resolution of each individual claim. Permitting a federal court to consider selected exhausted claims in a petition could produce untoward effects if a state prisoner prosecutes the exhausted claims in the state court system while pursuing his unexhausted claims through the federal system.

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[6] *See Miller* v. *Hall*, 536 F.2d 967, 969 (1st Cir. 1976); *State ex rel. Levy* v. *McMann*, 394 F.2d 402, 405-406 (2d Cir. 1968); *United States ex rel. Boyance* v. *Myers*, 372 F.2d 111, 112-113 (3d Cir. 1967); *Hewett* v. *North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969); *Triplett* v. *Wyrick*, 549 F.2d 57, 59 (8th Cir. 1977); *Watson* v. *Patterson*, 358 F.2d 297 (10th Cir. 1966).

Adoption of such a rule would create an incentive for a state prisoner to develop fully *all* his claims in the state courts before travelling to the federal system in quest for vindication of his constitutional rights. Such a rule is compatible with recent decisions of this Court which have limited the scope of habeas corpus relief in the interest of the administration of justice. *See Stone* v. *Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Francis* v. *Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

In the instant case, the district court's need for guidance in this area is best illustrated by its own struggle in addressing the exhaustion doctrine while yet granting habeas corpus relief upon the merits of *all* grounds for relief cited in Lundy's petition. Though the district court stated that it would not consider the unexhausted claims in their "constitutional framework," the lower court based its granting of habeas corpus relief upon errors in the state trial raised by the unexhausted claims. (*See* App. C, pp. A-12-13, attached herewith).

2. The district court improperly granted habeas corpus relief because of remarks by the prosecuting attorney which were neither objected to at trial nor presented to the Tennessee Supreme Court and where no cause or actual prejudice was shown for Lundy's precedural defaults. Lundy alleged in grounds 2 and 3 of his petition that the prosecuting attorney had made two improper remarks at trial: he alluded to Lundy's "violent character" during a proffer of evidence before the jury and he improperly alluded to Lundy's failure to testify during the state's rebuttal argument in its summation to the jury. (A. 155-164). The district court found that ground 3 had *not* been exhausted but nevertheless proceeded to expand the claims of alleged prosecutorial misconduct to include *seventeen* additional remarks made by one of the prosecuting attorneys. The district court ignored the state's contentions in its answer that consideration of the alleged additional acts of prosecutorial misconduct were barred from review due to the state procedural

defaults by Lundy in failing to make contemporaneous objections. *See Wainwright* v. *Sykes,* 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594, 610 (1977)[7]

Significantly, Lundy raised only two specific instances of prosecutorial misconduct in the state courts. (A. 46-105, 116-130). The district court ignored Tennessee's procedural rules and evidently held that such alleged prosecutorial misconduct constituted plain error. (*See* App. C, p. A-12, attached herewith). Such finding was made in spite of the fact that some remarks were made *out of the presence of the jury.* The State of Tennessee argued before the Court of Appeals for the Sixth Circuit that the district court's application of the federal plain error rule was erroneous and that Tennessee's plain error rule should have been applied. Such an analysis would have precluded federal review of the additional instances of alleged prosecutorial misconduct. The Court of Appeals rejected this argument and the reasoning of a different panel of that court. *See Hockenbury* v. *Sowders,* 620 F.2d 111, 114 (6th Cir. 1980).

Even assuming that the district court properly expanded Lundy's petition, *sua sponte,* to include the additional instances of alleged misconduct, the State contends that the district court improperly granted relief on this ground as the statements did not amount to egregious error. *See, Donnelly* v. *DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

3. Even if the partial record supports Lundy's claim for habeas corpus relief the Court of Appeals should have remanded the cause for a full and fair evidentiary hearing so that the *en-*

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[7]Tennessee has long operated under a procedural rule requiring contemporaneous objections to remarks and arguments by a prosecutor in order to seek appellate review of the prosecutor's alleged misconduct. *Edwards* v. *State,* 540 S.W.2d 641 (Tenn.,1976), *cert. den.,* 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777; *Manning* v. *State,* 195 Tenn. 94, 257 S.W.2d 6, 45 A.L.R.2d 299 (1953).

tire state trial transcript could have been reviewed by the district court. The district court granted habeas corpus relief to Lundy nine days after the State of Tennessee filed its answer to the petition. With its answer the State filed only those portions of the voluminous state trial transcript which had been cited in Lundy's petition pertinent to the *specific* claims for relief. The district court granted habeas corpus relief, *inter alia,* on the ground that Lundy was deprived of his right to due process of law because of prosecutorial misconduct. However, the district court did not review the *entire* state trial transcript as required by this Court in *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436 (1974).

Although the State of Tennessee did not move for reconsideration in order to offer the entire state trial transcript, the state did request such a relief before the Court of Appeals, which was denied.* Althouth no requests for an evidentiary hearing were made in the district court, such failure does not operate as a waiver of the right to insist upon a full and fair evidentiary hearing on behalf of the state.

> Respondent's failure to assert the need for an evidentiary hearing in his motion to dismiss did not necessarily deprive him of the right to assert the absence of a hearing . . . as error on appeal . . .. *Browder* v. *Director, Department of Corrections of Illinois,* 434 U.S. 257, 266, 98 S.Ct. 556, 562, 54 L.Ed.2d 521, 532-533 (1978).

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*The request was made by the State in a supplemental citation of authorities, during oral argument and in its petition for rehearing and suggestions *en banc.* In conjunction with the request for remand the State moved for permission to file the entire state trial transcript with the Court of Appeals in support only of its request for a remand. The motion was twice denied.

This rule is in accord with the rule followed in several other circuits.[9]

The State of Tennessee contends that the district court in the instant case should not have been so hasty in overturning two state convictions which passed the close scrutiny of four state court proceedings.

The resulting injustice caused by the refusal to grant the state a full evidentiary hearing is illustrated by the rationale of the district court in granting the writ. The district court held that what aggravated Lundy's Sixth Amendment claim was that the state's evidence rested solely upon the credibility of the rape victim. However, if the district court had only reviewed the entire state trial transcript, it would have realized that the rape victim's testimony was corroborated in all respects by the defendant's female companion, Terri Tankersly, who was an eyewitness to the crimes. (*See* App. D, p. A-16-17, attached herewith). Not only did the State fully corroborate the rape victim's testimony with the testimony of Tankersly, but the State also introduced Lundy's confession.

The district court knew that the state trial transcript contained this important evidence because it reviewed the decision of the Tennessee Court of Criminal Appeals, which substantially

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[9]*Aston* v. *Warden, Powhatan Correctional Center,* 574 F.2d 1169, 1171-1172 (4th Cir. 1978) (failure to request evidentiary hearing at trial level does not operate as a waiver of issue on appeal); *United States ex rel. Mitchell* v. *Follette,* 358 F.2d 922, 929 (2d Cir. 1966) (state's failure to request evidentiary hearing does not entitle district court to grant relief where hearing is otherwise appropriate); *United States ex rel. McNair* v. *New Jersey,* 492 F.2d 1307, 1309 (3d Cir. 1974) (state's failure to request evidentiary hearing does not operate as a waiver of error on appeal); *Willette* v. *State of Georgia,* 608 F.2d 538, 541 (5th Cir. 1979) (grant of habeas corpus relief is reversed and case remanded to permit the state to offer complete state trial transcript concerning plea acceptance hearings).

relied upon the confession and Tankersly's testimony to affirm Lundy's convictions. The federal courts' haste in granting the writ and in failing to grant the State a full evidentiary hearing has turned away the entire state transcript which, if examined, would reflect that the rape victim's testimony was amply corroborated by the testimony of a witness to the criminal episode and by the defendant's own confession. (*See* App. D, pp. A-16-19, attached herewith). Further, review of the entire record would conclusively demonstrate that any prosecutorial misconduct did not deprive Lundy of liberty without due process of law.

> [H]ere the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that *examination of the entire proceedings* in this case supports that contention. *Id.*, 416 U.S. at 643, 94 S.Ct. at 1871, 40 L.Ed.2d at 436-437 [emphasis added].

4. The Court of Appeals misread the state trial transcript in concluding that the defendant was deprived of his Sixth Amendment right of confrontation. At his state trial, Lundy sought to cross-examine the rape victim concerning the substance of an interview with Lundy's defense counsel which occurred prior to trial. Although the rape victim had admitted previous acts of unchastity, Lundy's counsel sought to impeach her by implying that she had admitted additional unchaste acts during the pretrial interview. (A. 4). The trial court precluded Lundy's counsel from further examination on this issue after the rape victim denied making the statements. (A. 4). The state trial court erroneously reasoned that because the defense counsel did not identify himself as being the defendant's attorney, the interview was not a proper subject of cross-examination. (A. 13). The state trial judge did, however, permit the respondent's trial counsel to fully examine the rape victim concerning her prior sexual conduct and to rebut her testimony on the subject. (A. 3-4).

Later during the trial, the state trial judge permitted Lundy's counsel to examine the rape victim during a jury-out hearing in order to make an offer of proof. (A. 30-33). Significantly, the rape victim *denied* making the alleged prior contradictory statements. (A. 33-34). Thus, Lundy was unable to lay a proper foundation for impeachment through the rape victim's own testimony as the subject of the examination dealt with a collateral issue.

The Tennessee Court of Criminal Appelas held that the state trial judge's erroneous reasoning for limiting the cross-examination was harmless, under the circumstances of the case and in light of the offer of proof.

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deemed to have been too restrictive a ruling. *See* App. D, p. A-22, attached herewith.

The district court's reliance upon *Davis* v. *Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), was clearly misplaced as the rape victim in the instant case readily admitted her prior sexual conduct. Lundy's Sixth Amendment claim is nothing more than an argument that the jury was entitled to hear an irrelevant cross-examination offered solely for the purpose of laying, in vain, a foundation for subsequent impeachment evidence.[10]

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[10]Tennessee law states that the cross-examiner is bound by the witness' denial of the prior contradictory statement when the statement pertains to a collateral issue. *Hanvy* v. *State,* 215 Tenn. 322, 385 S.W.2d 752 (1965).

The decisions of the federal courts are the product of serious misreadings of the state trial transcript. Both courts ignored the fact that Lundy failed to lay a proper foundation for the alleged prior statements during the jury-out hearing. Under state law the trial judge's ruling was correct because of Lundy's failure to lay a proper foundation during the offer of proof. There was no denial of Lundy's right of confrontation as the federal courts so held.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

APPENDIX

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APPENDIX A

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah Harrison Lundy,
Petitioner-Appellee

v.

James Rose, Warden, and the
Attorney General of Tennessee,
Respondents-Appellants

Order
(Filed June 27, 1980)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had impermissibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. *See Galertieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978) and *Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah H. Lundy,
Petitioner-Appellee

v.

Jim Rose, Warden, Tennessee
State Penitentiary,
Respondent-Appellant

Order
(Filed September 4, 1980)

Before: CELEBREZZE, ENGEL, and MARTIN, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 79-3081-NA-CV

Noah Harrison Lundy

v.

Vinson Thompson, Warden,
Tennessee State Penitentiary
and the Attorney General for
the State of Tennessee

Order

(Filed March 21, 1979)

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

/s/ L. Clure Morton

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3081-NA-CV

Noah Harrison Lundy

v.

Vinson Thonpson, Warden,
Tennessee State Penitentiary
and the Attorney General for
The State of Tennessee

Memorandum

(Filed March 21, 1979)

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.
>
> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we've[ves] [sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, *I, like General Gill, could not believe the words* I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

(i) On the other hand, *if you think as I do,* and I've never wanted to be on a jury more in a case *I've tried,* that this is one of the most despicable crime *I have ever heard* testimony presented in six years of being in prosecution . . . . (emphasis supplied)

> . . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

> (j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, *for every witness is presumed to swear the truth.*" (emphasis supplied)

Without determining the legality of the above charge (*See generally,* Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). *Cf. Donnelly* v. *De Christoforo,* 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial im-

propriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) *See generally, United States ex rel. Fournier* v. *Pinto,* 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

/s/ L. CLURE MORTON
CHIEF JUDGE

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
KNOXVILLE, APRIL, 1974

No. 283, Knox County
Hon. Richard R. Ford, Judge
(Rape and Crime Against Nature)

Noah Lundy,
Plaintiff-in-Error

v.

State of Tennessee,
Defendant-in-Error

For the Plaintiff-in-Error

Dale C. Workman and
Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys
General

Opinion Filed: August 30, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

Opinion
(Filed August 30, 1974)

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase soft drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was concerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexually violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of the captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. He then allowed her to stop. Terri Tankersly

testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of *King* v. *State,* 210 Tenn.150, 357 S.W.2d 42 (1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. *Kind* v. *State, supra.* Whether force was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admittedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or

fear due to threats of force is void and the offense rape. *1 Wharton's Criminal Law and Procedure* 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See *Ward* v. *State*, Tenn.Crim.App., 486 S.W.2d 292, *Harris* v. *State*, 206 Tenn.276, 332 S.W.2d 675; and *Rockett* v. *State*, Tenn.Crim.App. 475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request". It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said: "Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal ef-

fect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adequate as given". We need not reach the question of substantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignment is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession. It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence. *King* v. *State, supra.* That the report was reduced to writing adds to the accuracy of the officer's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error related to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); *Huffman* v. *State,* ____ *Tenn.Crim.App.* ____, 458 S.W.2d 29(1970).

The next assignment of error is that the Court erred in convicting the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. *Locke* v. *State,* Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a

crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "* * * unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female, * * *".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and abettors deemed principal offenders. — All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the principal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution

to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming

case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

We have carefully examined all assignments of error. We affirm the convictions.

/s/ William S. Russell, Judge

CONCUR:

W. Wayne Oliver, Judge

Robert K. Dwyer, Judge

APPENDIX E

In the Supreme Court of Tennessee
at Knoxville

Knox Criminal
Docket No. 283 C.C.A.

Noah Lundy,
Petitioner,

v.

State of Tennessee,
Respondent.

In Re: Petition for Writ of Certiorari of Noah Lundy
(Filed March 10, 1975)

Upon consideration of the petition for certiorari and the entire record in the cause,

We are of the opinion that the Court of Criminal Appeals correctly dealt with the assignments of error in that court and no new issues having been raised on the petition herein, the writ is denied.

PER CURIAM